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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JESUS PEREDA RAMOS,

Defendant and Appellant.

D052150

(Super. Ct. No. SCD200065)

APPEAL from a judgment of the Superior Court of San Diego County, Charles G. Rogers, Judge. Affirmed.

Jesus Ramos appeals from a judgment convicting him of various sex offenses arising from his molestation of his two stepdaughters. He asserts the judgment must be reversed and the case dismissed because his constitutional rights to a speedy trial and due process were violated due to a lengthy delay in bringing his case to trial. Given that Ramos was the cause of the delay, there were no bad faith delay tactics by the

prosecution, and there was no significant prejudice to the defense, we reject this contention.

As to sentencing, Ramos contends his rights under *Cunningham v. California* (2007) 549 U.S. 270 were violated because the trial court selected upper term sentences based on facts that were not found by the jury. We also reject this assertion, and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

We summarize the facts concerning the underlying sex offenses, and present some facts relevant to Ramos's speedy trial claim. Additional facts concerning the speedy trial issue are set forth in our discussion below.

Ramos molested his two stepdaughters (R. and E.) when they were young girls. After the girls disclosed the sexual abuse, Ramos was charged and arrested. In 1985, he was released on his own recognizance. Ramos was ordered to appear at a felony disposition conference and preliminary hearing, but failed to appear. A warrant was issued for his arrest. About 21 years later (in 2006), he was arrested when he was crossing the border from Mexico into San Diego. The border guard ran Ramos's California Department of Motor Vehicles (DMV) identification card through the computer system, and discovered the outstanding arrest warrant. Ramos had been residing and working in Mexico during the 21-year period. After his arrest in 2006, he was bound over for trial at the preliminary hearing and an information filed. Ramos then moved for dismissal of the case based on a violation of his constitutional speedy trial right. The trial court denied the motion and the case proceeded to trial.

The two victims (R. and E.), now adults ages 35 and 39, testified at trial, describing the sexual molestation that occurred when they were young girls. The girls lived with Ramos, their mother (Carmen), and two brothers. Ramos molested R. from about age three or four to 11, and he molested E. from about age seven to 12.

In the first incident recalled by R., Ramos ducked her head under the water while she was taking a bath, causing her to feel as if she were drowning, and then carried her to his bed, laid her on her stomach, and inserted his penis into her "genitalia."¹ R. recalled another incident that occurred when she was about eight years old while she was taking a nap. Ramos turned her over and took off her pants. She heard him unzip his pants, and he then inserted his penis into her genital area. The molestation involving this type of intercourse occurred once or twice a year for about nine years. In the spring of 1983, he had "full intercourse [with her] on the living room floor." During the nine-year period Ramos would also perform oral sex on her; this occurred less often than the intercourse. Additionally, he regularly touched her in a sexual manner. When she was washing dishes, he would come and rub his penis against her back. He also touched her breasts.

The first incident E. recalled was that Ramos put her on his lap and touched her while she tried to "jiggle away" from him. He touched her on the "breast area," tried to kiss her, and tried to coax her to "give in to his advances." The molestation advanced to "full intercourse," anal sex, and oral sex. For a period of time while she was in elementary school, Ramos had intercourse with her on a nightly basis while her mother

¹ R. testified she did not understand anatomy when she was a little girl and she was not certain which part of her genitalia was involved in the incident.

was at night school. There were also several incidents of anal intercourse and oral sex. Ramos would "corner [her]" in the kitchen and touch her and try to "[s]educe [her]." The intercourse, anal sex, and oral sex continued through her elementary school years. He also made her touch his penis.

While E. was still in elementary school, E. told her mother what Ramos was doing to her. Her mother started to cry and said she would talk to him. When her mother confronted Ramos, he "beat the living day lights" out of E. When E. was about 11 or 12 years old, she asked R. if Ramos was "touching her or bothering her." R. started to cry, and "at that point, [E.] knew" that R. was also being molested. E. and R. went to their mother, and E. told her mother that it was "happening to [R.], too." Their mother took one or both girls to a clinic to be examined by a doctor, but never contacted the authorities.²

When E. was about 14 years old and in junior high school, she moved in with her grandparents because she had started to menstruate and her mother did not want her to get pregnant. After E. left the home, Ramos molested R. more frequently. In May 1983, when R. was almost 12 years old, her school showed a video about improper touching. After seeing this video, R. told her teacher that her stepfather had molested her. The authorities were summoned, and R. was removed from her home by the social services department.

² According to a social worker who later interviewed R., R. stated that the doctor at the clinic who examined her did not "find anything wrong with her."

During the investigation of the case, R. was interviewed by a police officer, a detective, and a hospital social worker. Given the lengthy passage of time, these individuals had little or no independent recollection of the case at trial. However, they referred to their written reports to detail the information provided by R. during the interviews. When interviewed by the detective assigned to the case, R. and E. described numerous incidents of sexual touching and intercourse occurring over the years, and specified the setting and time period in which several of the incidents occurred.

Defense

To refute the prosecution's case, the defense presented evidence to support its theories of fabrication and false memories, including that E. made up the molestation claims because she was unhappy about living with her mother and stepfather rather than with her grandparents (with whom she had lived up to age seven), E. implanted the molestation belief in R.'s mind, and persons who spoke to the girls at the time of disclosure implanted the molestation belief by asking leading questions. A psychologist testified about the problem of suggestibility in children, and stated that in the early 1980's there were no standard protocols for interviewing children about sexual abuse claims, interviewers may have been unaware of the problem of suggestibility, and there was a tendency to believe that if a child made an allegation it was likely true. E. and R.'s mother testified that she never saw any signs of molestation, and a doctor at a clinic who examined E. told her there were no indications of molestation.

A medical doctor called by the defense opined that because of lack of research and misunderstandings about normal variations in children's genitalia in the early 1980's,

observations about E.'s and R.'s genitalia set forth in medical reports from Children's Hospital could have been misinterpreted to reflect sexual abuse.³ Several character witnesses (including Ramos's son and stepdaughter from another relationship, his nephew, and an attorney colleague) testified they had never seen Ramos engage in inappropriate touching of children. A psychologist who examined Ramos opined that he had personality characteristics that were consistent with persons who both do and do not sexually abuse children.

Jury Verdict

As to victim R., Ramos was charged with two counts of lewd act on a child under age 14. (Pen. Code,⁴ § 288, subd. (a).)⁵ As to victim E., Ramos was charged with two counts of lewd act on a child under age 14 (§ 288, subd. (a)), two counts of sexual intercourse with a person under age 18 (§ 261.5, subd. (a)), one count of sodomy of a person under age 14 and more than 10 years younger (§ 286, subd. (c)(1)), and one count of oral copulation with a person under age 14 and more than 10 years younger (§ 288a,

³ The prosecution did not introduce the Children's Hospital medical reports into evidence; these reports were referred to solely during the defense evidentiary presentation.

⁴ Subsequent statutory references are to the Penal Code.

⁵ The prosecution originally charged Ramos with two additional counts alleging sexual intercourse with R., but these counts were dismissed at the preliminary hearing. R. did not testify at the preliminary hearing, and at the conclusion of the hearing the trial court found the prosecution had not presented competent evidence for the sexual intercourse counts involving R.

subd. (c)). The jury found him guilty as charged. He was sentenced to 12 years 8 months in prison.

DISCUSSION

I. Motion to Dismiss for Violation of Speedy Trial Right

Ramos contends that the lengthy delay in bringing him to trial after the filing of the complaint and his arrest violated his federal and state constitutional speedy trial and due process rights.

A. Background

The original complaint against Ramos was filed on June 1, 1983, and a warrant issued for his arrest. He was arrested in October 1985. At his arraignment on October 15, 1985, Ramos pleaded not guilty and the court granted his request for appointed counsel. On October 23, 1985, Ramos was released from jail on his own recognizance. In the "Agreement for O.R. Release" signed by Ramos, he promised to appear in court on November 27 and December 6, 1985, the dates set for a felony disposition conference and the preliminary hearing. The O.R. agreement also included his promise not to depart the state without the court's permission. In the agreement Ramos provided a Tijuana address on Calle Ricardo Castro. Ramos failed to appear on November 27, and a bench warrant was issued for his arrest.

Ramos was not arrested until about 21 years later when he attempted to cross the border from Mexico into the United States in 2006. At the port of entry, Ramos presented a California DMV identification card. Using the identification card, the border guard entered a query into the computer and discovered the outstanding arrest warrant.

In July 2006, the preliminary hearing was conducted, Ramos was bound over for trial, and an information was filed. On September 28, 2006, Ramos moved to dismiss the case based on a violation of his right to a speedy trial.

On June 6 and 7, 2007, the court conducted a hearing on Ramos's speedy trial motion. Ramos asserted that he was readily locatable but the government made no efforts to find him and that his case was prejudiced by the delay.

Ramos submitted evidence showing that he is a licensed Mexican attorney, and during the 21-year period between his 1985 release and his 2006 arrest he lived at the Calle Ricardo Castro address in Tijuana that he provided in the O.R. release agreement. Next door to his residence he maintained his office with a sign displaying his name. He never moved back to San Diego County, but he maintained contacts in the county. From 1992 to 1993, he and his ex-wife Carmen had a car registered with the California DMV with a San Diego County address.⁶ In 1992, he tithed to a church in San Diego County. From about 1992 to 1995 he received mail at his cousin's residence in San Diego County; in 1995 he had a San Diego County bank account using his cousin's address; and in 1995 he obtained a California DMV identification card and registered a vehicle with the DMV using his cousin's address. In 1997, he submitted a form to the United States Customs Service to import goods from Mexico. From about 2004 to 2006 he received mail at his son's residence in San Diego County, and in 2005 he obtained a California DMV identification card using his son's address. He provided his true name and date of birth

⁶ The San Diego address on the car registration was actually a "Postal Annex type address" frequently used to receive mail by people who live in Mexico.

on the DMV identification cards. In 2005, he applied for United States citizenship, and obtained a Social Security card using his son's address. His relatives, including at least one of the victims, knew where he lived in Tijuana. Over the years he repeatedly crossed the border using the DMV identification cards.

The authorities never contacted Ramos's relatives in San Diego County to inquire about him. There was no showing the government tried to check for information about him through DMV records, or to contact him at his Tijuana address. In 1986 the San Diego district attorney's office established an International Liaison Unit which has been used to locate fugitives in Tijuana and, with the cooperation of Mexican authorities, secured their apprehension. This unit never attempted to locate Ramos or secure his apprehension. In 2006 (apparently after his arrest), the unit communicated by phone or email with the Mexican authorities and was provided with information indicating that he was a licensed attorney in Mexico.

Relevant to the issue of prejudice, the parties submitted information concerning what evidence was and was not available after 21 years. Both victims were available to testify. Two of the school personnel who spoke to R. when she disclosed the molestation were not available (i.e., R.'s teacher was deceased and the defense had been unable to locate the school secretary). The school had no records of the disclosure incident. However, a school nurse who also spoke with R. was available. The police officer, detective, and hospital social worker handling the case had little or no independent recollection of the case, but their written reports were available. The social services report had been purged from the county's files, and the county social worker assigned to

the case had no recollection of the case. The doctors who examined the girls at Children's Hospital, as well as the medical reports they prepared, were available. However, a medical forensics expert testified that it was not possible to properly evaluate the medical findings without magnified photographs of the genitalia, which were not included in the girls' medical files even though the technology was used in the 1980's. The defense had been unable to locate a clinic where Carmen claimed to have taken E. for an examination and where the doctor had stated there was no evidence of abuse.

Ramos argued that his speedy trial right was violated even though he failed to appear in court in 1985. He contended the government had not shown that his failure to appear was for the purpose of avoiding prosecution because he never tried to hide in Mexico and had repeated contacts with the California government; the government had his address in Tijuana and was grossly negligent in failing to try to locate him; and the delay prejudiced his case because of loss of memories and evidence.

In response, the prosecutor argued that Ramos's speedy trial right was not violated because he knew about the charges but failed to appear; he could have elected at any time to come to court and exercise his speedy trial right; the California police could not arrest him in Mexico; he used several different addresses in California and never lived at any of these residences; in previous years the DMV and law enforcement data bases were not connected; and it was not possible for border guards to run a computer check on every person who crossed the border. As to prejudice, the prosecutor asserted the case essentially concerned the credibility of the victims, who were available to testify.

Additionally, the reports from the police, the hospital social worker, and the examining doctors still existed and these people were available to testify.

The trial court denied the speedy trial motion, finding that notwithstanding the very lengthy delay there was minimal or no prejudice to the defendant. The court reasoned that the two complaining witnesses would be testifying; the offenses involved conduct that by its nature would be remembered into adulthood; and there were written reports from persons who had interviewed and examined the girls. Further, considering the reasons for the delay, the court found the fact that Ramos knew about the criminal proceeding and signed a promise to appear supported an inference that he deliberately failed to appear to avoid prosecution. The court assessed that he subsequently attempted to elude the court's processes because he remained in Mexico, used a series of California addresses for mail but never lived at these addresses, and obtained California identification cards by using addresses where he never lived. The court found that Ramos's willful failure to appear and his subsequent conduct supported a waiver of the speedy trial right. Further, the court observed that the California police could not have gone to Tijuana to arrest him. The court concluded that on balance, even assuming the government bore some responsibility for the delay, there was no violation of the speedy trial right given the minimal prejudice to the defense and the defendant's willful concealment and failure to assert his right.

B. *Analysis*

A defendant has a federal and state constitutional right to a speedy trial. (*Barker v. Wingo* (1972) 407 U.S. 514, 515 (*Barker*); *Doggett v. United States* (1992) 505 U.S.

647, 648-650 (*Doggett*); *People v. Martinez* (2000) 22 Cal.4th 750, 765 (*Martinez*).)

Unreasonable delay may prejudice a defendant by impairing the ability to adequately prepare a defense because of such factors as deceased or unavailable witnesses, diminishing memories, and loss of exculpatory evidence. (*Barker, supra*, 407 U.S. at p. 532; *Doggett, supra*, 505 U.S. at p. 654.) If the constitutional right to a speedy trial was violated, the defendant is entitled to a dismissal of the case. (*Barker, supra*, at p. 522.)

1. *Federal Constitutional Speedy Trial Right*

Preliminarily, we address the parties' dispute as to whether this case implicates the federal constitutional speedy trial right, or only the state constitutional speedy trial right. The trial court concluded the federal constitutional speedy trial right had not attached in Ramos's case because the delay occurred after he was charged and arrested, but before he was bound over for trial following the preliminary hearing.⁷ Accordingly, the court evaluated the case only under the California Constitution. We conclude this ruling was erroneous. However, even applying the federal constitutional standard, we hold the trial court's ruling denying speedy trial relief was correct.

Under the federal Constitution, the speedy trial guarantee begins to operate either on the filing of "a formal indictment or information," or when the defendant is subjected to the "actual restraints imposed by arrest and holding to answer a criminal charge" (*United States v. Marion* (1971) 404 U.S. 307, 320; *Martinez, supra*, 22 Cal.4th at p.

⁷ At the speedy trial hearing, defense counsel confined his oral arguments to the state constitutional speedy trial right, but preserved a claim under the federal Constitution by means of argument in his written motion.

761.) Whereas the mere filing of a felony complaint (as opposed to a postpreliminary hearing information or grand jury indictment) triggers the state constitutional speedy trial right, it is not sufficient to trigger the federal constitutional right. (*Martinez, supra*, at pp. 755-756, 761-765.) However, if the defendant is arrested after the filing of a complaint, the federal speedy trial right "attaches upon arrest *unless* the defendant is released without restraint or charges are dismissed." (*Id.* at p. 762.)

In *Martinez, supra*, 22 Cal.4th at pages 761-763, the California Supreme Court interpreted the language in the United States Supreme Court's *Marion* decision defining the federal constitutional speedy trial right as arising upon "'arrest and holding to answer.'" The *Martinez* court concluded that the "holding to answer" standard did not require that the defendant have been bound over for trial following a preliminary hearing, but rather merely requires that the defendant have been arrested and not released without restraint, i.e., arrested and held in custody or released on bail or recognizance. (*Martinez, supra*, 22 Cal.4th at pp. 761-763 [federal speedy trial right attaches when defendant is "'brought before a judicial officer . . . upon which that judicial officer orders the defendant thereafter held in custody or released on bail or recognizance'"]; see also *Dillingham v. United States* (1975) 423 U.S. 64, 65 [federal speedy trial right attached when government commenced its prosecution against defendant by arresting him and releasing him on bond, even though indictment not yet filed]; *United States v. Stead* (8th Cir. 1984) 745 F.2d 1170, 1172 [arrest triggers speedy trial right "where it is the beginning of continuing restraints on defendant's liberty imposed in connection with the formal charge on which defendant is eventually tried"].) Thus, the filing of a felony

complaint, coupled with the arrest of the defendant, triggers the federal speedy trial right even if the defendant is released on bail or own recognizance. (*Martinez, supra*, at pp. 762-765; *Scherling v. Superior Court* (1978) 22 Cal.3d 493, 504 [federal speedy trial right "attaches after an arrest or the filing of an indictment or information"].)

Once the federal constitutional speedy trial right attaches, the courts balance four criteria to determine whether the right has been violated: (1) the length of the delay; (2) whether the government or the defendant is more to blame for the delay; (3) whether the defendant asserted his right to a speedy trial in due course; and (4) whether the defendant suffered prejudice from the delay. (*Doggett, supra*, 505 U.S. at pp. 651-652; *Barker, supra*, 407 U.S. at p. 530.) Under the federal Constitution, an uncommonly long delay creates a rebuttable presumption of prejudice. (*People v. Lowe* (2007) 40 Cal.4th 937, 942.) In contrast, when only the state constitutional speedy trial right applies, the defendant has the initial burden to affirmatively show prejudice; the burden then shifts to the prosecution to show justification for the delay; and then the court weighs the justification against the actual prejudice suffered by the defendant. (*Ibid.*; *Martinez, supra*, 22 Cal.4th at pp. 755-756, 766-768; *People v. Roybal* (1998) 19 Cal.4th 481, 513.)

Here, Ramos was charged, arrested, arraigned, and released on his own recognizance upon an agreement to return to court. The federal constitutional speedy trial right attached because after his arrest he was not released without restraint, but rather was brought before a judicial officer and subjected to the commencement of the criminal

proceedings. (*Martinez, supra*, 22 Cal.4th at pp. 762-763.)⁸ Accordingly, the trial court erred in failing to apply the federal speedy trial standard.

However, the error was harmless. We independently review whether the federal constitutional speedy trial right was violated. (See *People v. Cromer* (2001) 24 Cal.4th 889, 894, 901-902 [de novo review of mixed questions of law and fact that affect constitutional rights]; *U.S. v. Sandoval* (9th Cir. 1993) 990 F.2d 481, 482 [de novo review of denial of speedy trial motion]; accord *U.S. v. Wanigasinghe* (7th Cir. 2008) 545 F.3d 595, 597; *U.S. v. Molina-Solorio* (5th Cir. 2009) 577 F.3d 300, 304.)⁹ The record is fully developed on all the criteria that must be balanced under the federal standard; accordingly, the trial court's failure to apply the federal standard does not hamper our

⁸ In *Martinez*, the defendant had been arrested by the police for driving under the influence, released, charged in a felony complaint, and then notified by mail that she was required to appear on the arraignment date. When the defendant did not appear, an arrest warrant was issued. About four years later, she was arrested; the preliminary hearing was held; and the information was filed. (*Martinez, supra*, 22 Cal.4th at pp. 756, 761.) The *Martinez* court rejected the assertion that the federal constitutional speedy trial right attached upon the filing of the felony complaint and issuance of the arrest warrant. (*Id.* at pp. 755-756, 764-765.) Here, unlike the situation in *Martinez*, Ramos had already been arrested, arraigned, and released on his own recognizance prior to his failure to appear. Under these circumstances, Ramos was entitled to the federal constitutional speedy trial protection.

⁹ In its briefing on appeal, the Attorney General sets forth the substantial evidence standard to evaluate the trial court's denial of the speedy trial motion, citing a case in which the trial court granted speedy trial relief. (*People v. Mitchell* (1972) 8 Cal.3d 164, 167.) Because of the constitutional stature of the speedy trial right, we conclude that although it is appropriate to defer to the trial court's determinations to the extent they involve resolution of factual issues, we must independently review those facts to determine whether a constitutional violation has occurred. (See *People v. Cromer, supra*, 24 Cal.4th at pp. 894, 901-902.)

ability to review the matter on appeal. As we explain below, the circumstances of this case show no violation of the federal constitutional speedy trial right.

2. *No Violation of Speedy Trial Right*

As noted, under the federal constitutional speedy trial right, the defendant is afforded the benefit of a presumption of prejudice when there is a lengthy delay. "[T]he presumption that pretrial delay has prejudiced the accused intensifies over time. . . . [¶] . . . [¶] . . . [E]xcessive delay presumptively compromises the reliability of a trial in ways that neither party can prove, or for that matter, identify." (*Doggett, supra*, 505 U.S. at pp. 652, 655.) However, lengthy delay does not alone establish a speedy trial violation; rather, the delay must be balanced with the three other criteria. (*Id.* at pp. 655-656.)

The courts have recognized that when a defendant *knows* he or she is being charged with a crime, and the defendant *intentionally avoids* the government's efforts to prosecute the case, the balance weighs heavily against a violation of the speedy trial right, and the defendant may even be deemed to have waived the speedy trial right. In *Doggett, supra*, 505 U.S. at page 653, the court stated that if the defendant (who had left the country) "knew of his indictment years before he was arrested [the] third factor, concerning invocation of the right to speedy trial, would be weighed heavily against him." (Accord *People v. Hsu* (2008) 168 Cal.App.4th 397, 405-407; *U.S. v. Wanigasinghe, supra*, 545 F.3d at p. 599; *U.S. v. Sandoval, supra*, 990 F.2d at p. 485.) As to waiver, the court stated in *Barker, supra*, 407 U.S. at page 529: "[I]f delay is attributable to the defendant, then his waiver [of the right to a speedy trial] may be given

effect under standard waiver doctrine" (Accord *People v. Perez* (1991) 229 Cal.App.3d 302, 308, 313-314 [defendant who flees jurisdiction for purpose of avoiding prosecution waives speedy trial right]; see also *People v. Hsu, supra*, 168 Cal.App.4th at p. 404.)

Ramos knew he was charged and that the government was prepared to proceed with the accusation against him. He failed to appear on the scheduled hearing date, and a warrant was issued for his arrest. The fact that he knew of the charges and knew he was required to appear supports that he intentionally decided not to appear in an attempt to avoid prosecution. Ramos did not refute the inference that his failure to appear was intentional. (Compare *Ogle v. Superior Court* (1992) 4 Cal.App.4th 1007, 1011-1012, 1018, 1021-1022 [defendant's failure to appear could be excused based on evidence that he suffered from blackouts and had no memory of being arrested for driving under the influence or of being released after signing a promise to appear].) Further, during the 21-

year period before Ramos was detained at the border, he could have elected at any time to effectuate his speedy trial right by contacting the authorities.¹⁰

In *Barker, supra*, 407 U.S. at page 536, the court stated: "[B]arring extraordinary circumstances, we would be reluctant indeed to rule that a defendant was denied this constitutional right on a record that strongly indicates, as does this one, that the defendant did not want a speedy trial." Here, the record shows that Ramos did not want a speedy trial. The criminal case against him was proceeding in due course towards trial, and Ramos voluntarily chose to stop the process by failing to appear. Further, the record does not show any extraordinary circumstances that warrant relieving Ramos of his responsibility for the delay. Notwithstanding the inevitable loss of memory and some potential loss of evidence caused by the passage of 21 years, Ramos was able to confront the key witnesses against him—the two victims. Further, written reports generated by various persons who interviewed and examined the victims were available, and these persons were available for cross-examination. The record supports that the presumption of prejudice arising from the 21-year delay was sufficiently rebutted so that the potential

¹⁰ In the speedy trial proceedings before the trial court, Ramos's counsel at one point argued that Ramos, because of a language barrier, may not have understood that he was required to return to court, or he may have thought the case was dismissed when nothing happened to him in the ensuing years notwithstanding his contacts with the government. The trial court noted that there was an interpreter at the hearing where he was released on his own recognizance, and Ramos's status as an attorney suggested he would have understood his obligation to return to court. Ramos did not submit any statements to the court indicating he misunderstood his obligation to appear, and he does not reiterate this argument on appeal. Given Ramos's failure to provide any statements reflecting a misunderstanding, as well as the level of his education and the presence of an interpreter at the O.R. release hearing, there is no basis to infer that he misunderstood his obligation to appear in court.

for prejudice does not overcome the heavy weight accorded to Ramos's responsibility for the delay.

To support his claim of prejudice, Ramos asserts that because of memory loss and witness unavailability, he was deprived of the opportunity to develop a defense based on contamination of the victims' memories by the persons who interviewed the victims when they reported the abuse. He asserts that when the victims reported the abuse in the early 1980's, it had not yet been recognized that suggestive interviewing techniques can implant false memories in children. We are not persuaded. If the case had gone to trial in the 1980's, the defense may have been able to more fully examine how the interviews were conducted, but the defense would not have had the benefit of any subsequently-developed information concerning suggestibility and contamination. Further, because the victims were adults by the time the case came to trial, Ramos had the opportunity to cross-examine them when their rational faculties were fully developed. Thus, the defense was able to question the adult victims about their claims of abuse without the difficulties associated with child witnesses. Ramos has not shown that the potential loss of contamination evidence so eviscerated the defense as to tip the scales in favor of finding a violation of his speedy trial right. (See *People v. Hsu*, *supra*, 168 Cal.App.4th at p. 407 [defendant's responsibility for delay requires showing of actual prejudice to warrant speedy trial relief].)

Additionally, the government's failure to find Ramos for 21 years was not based on any intent to delay the case to gain an impermissible tactical advantage. (See *Doggett*, *supra*, 505 U.S. at pp. 656-657 [lengthy delay caused by official bad faith makes speedy

trial relief "virtually automatic"].) The government's role in the delay was, at most, passive negligence arising from the failure to try to secure the cooperation of Mexican authorities to bring Ramos to San Diego. When the government's arguable passive negligence is balanced against Ramos's conscious decision to ignore the pending charges, the balance falls on the side of no speedy trial violation.

Ramos asserts that his case is comparable to the circumstances in *Doggett, supra*, 505 U.S. 647, which involved an eight and one-half year delay caused by government negligence in failing to search for a defendant who had left the country for a period of time. (*Id.* at pp. 649-650, 657-658.) The contention is unavailing. In *Doggett*, the defendant had not been arrested and did not know that an indictment had been filed against him. The *Doggett* court concluded that because the evidence showed the defendant did not know he was being charged, he could not be faulted for failing to invoke his speedy trial right during the eight and one-half year period. (*Id.* at pp. 648-649, 653-654; accord *Ogle v. Superior Court, supra*, 4 Cal.App.4th at p. 1021 [defendant's lack of knowledge of pending charges can excuse failure to assert speedy trial right].) In contrast here, the record shows Ramos failed to appear even though he knew about the charges. Thus, he can be properly faulted for failing to invoke his speedy trial right.

We conclude that on balance, Ramos's deliberate decision to avoid the legal proceeding by failing to appear, the absence of bad faith tactics by the government, and the lack of significant prejudice to the defense establishes his federal constitutional speedy trial right was not violated. For the same reasons, there was no violation of

Ramos's speedy trial right under the state Constitution, nor was there a violation of his due process rights. (See *Martinez, supra*, 22 Cal.4th at pp. 765, 767; *People v. Catlin* (2001) 26 Cal.4th 81, 107.)

II. *Upper Term Sentences*

To impose the 12-year 8-month sentence, the court selected count 1 (lewd act involving E.) as the base term, and imposed consecutive sentences (one-third the middle term) for count 2 (eight months, sexual intercourse, E.), count 3 (two years, sodomy, E.), and count 7 (two years, lewd act, R.). The court imposed concurrent, upper term sentences for counts 4 (lewd act, E.), 5 (sexual intercourse, E.), 6 (oral copulation, E.) and 8 (lewd act, R.). Based on its selection of concurrent rather than consecutive sentences for these latter counts, the court selected an eight-year upper term sentence for count 1. Additionally, the court stated its choice of terms was justified by factors of victim vulnerability, calculated and ongoing conduct, violation of a position of trust, and lack of acceptance of responsibility.

Ramos asserts the trial court violated his federal constitutional jury trial right because the upper term sentences were based on aggravating findings made by the court rather than the jury. Even if we reach this issue on its merits notwithstanding Ramos's failure to object below, the contention is unavailing. The federal constitutional jury trial right requires that a jury must find any fact, other than a prior conviction, that increases a sentence beyond the prescribed statutory maximum. (*Cunningham v. California, supra*, 549 U.S. at pp. 288-289; *People v. Wilson* (2008) 164 Cal.App.4th 988, 991.) In *Cunningham*, the United States Supreme Court held that the middle term was the

prescribed statutory maximum under California's determinate sentencing provision, section 1170, subdivision (b). (*Cunningham, supra*, at p. 293.) However, effective March 2007, the Legislature amended section 1170, subdivision (b) so that the upper term, rather than the middle term, is the prescribed statutory maximum. (Stats. 2007, ch. 3, § 2, p. 5; Historical and Statutory Notes, 50C West's Ann. Pen. Code (2010 Supp.) foll. § 1170, p. 35; *People v. Wilson, supra*, 164 Cal.App.4th at p. 992; *People v. Jones* (2009) 178 Cal.App.4th 853, 866; see *People v. Sandoval* (2007) 41 Cal.4th 825, 844-855.)

When Ramos was sentenced in November 2007, this amendment was operative.

Accordingly, the trial court was authorized to select upper terms based on its own factual findings because an upper term is not beyond the prescribed statutory maximum. (*People v. Wilson, supra*, 164 Cal.App.4th at p. 992; *People v. Jones, supra*, 178 Cal.App.4th at pp. 866-867.)

DISPOSITION

The judgment is affirmed.

HALLER, J.

WE CONCUR:

NARES, Acting P. J.

MCINTYRE, J.